

## **Private Housing (Tenancies) (Scotland) Bill**

### **Written submission to the Infrastructure and Capital investment Committee**

#### **The Competition and Markets Authority (CMA)**

The Competition and Markets Authority (CMA) welcomes the opportunity to respond to the Infrastructure and Capital Investment Committee's consultation on the Private Housing (Tenancies) (Scotland) Bill. Our submission relates to the power in the Bill that would allow the introduction of regulations that prescribe statutory terms for a private residential tenancy.

The CMA is a non-ministerial government department working to promote competition for the benefit of consumers and businesses across the UK. Our aim is to make markets work well for consumers, businesses and the economy. We have a range of powers for investigating and enforcing against anti-competitive behaviour and investigating the effective functioning of markets. We also have powers to enforce consumer protection legislation to tackle practices that make it difficult for consumers to exercise choice.

We have a particular interest in ensuring compliance with the law on unfair terms, which apply to terms drawn up by a trader (in goods or services) that are required to be fair and understandable to the consumer. The Consumer Rights Act 2015 (CRA) came into force in October this year and this amends the law on unfair terms, in line with the Unfair Terms Directive (Council Directive 93/13/EEC on unfair terms in consumer contracts). Section 62 of the CRA requires that terms in consumer contracts are fair and that an unfair term is not binding upon the consumer. A term is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. The CMA published updated Guidance to explain the changes to unfair terms law in the CRA as well as taking into account key findings from CJEU judgments, on 31st July 2015<sup>1</sup>.

A tenancy agreement between a landlord and a tenant or tenants is a consumer contract for the purposes of Part 2 of the CRA. This means that the terms set out in a tenancy agreement should meet the requirements of the CRA relating to fairness. Examples of potentially unfair terms include unusual or overly restrictive requirements that the tenant will have to satisfy or terms that require the tenant to pay charges, the amount of which can be set at the landlord's discretion or varied unilaterally. The CMA published guidance<sup>2</sup> for the lettings agent sector in 2014 on compliance with consumer law and this included a section relating to tenancy

---

<sup>1</sup> <https://www.gov.uk/government/publications/unfair-contract-terms-cma37>

<sup>2</sup> <https://www.gov.uk/government/publications/consumer-protection-law-for-lettings-professionals>

agreements that we consider is equally relevant for individual landlords 'contracting' with their tenants. In summary, consumer protection is an important safeguard for tenants in addition to the statutory protections provided in housing legislation.

The CMA has noted Part 2 of the Bill, Tenancy Terms, and the proposal that Scottish Ministers may by regulations prescribe terms (referred to in the Bill as "statutory terms") into a private residential tenancy. It is our view that there should be some consideration of how aspects of this proposal could lead to the consumer protections outlined above being compromised.

Section 73 of the CRA dis-applies the test of fairness set out in Section 62 to a term of a contract to the extent that it reflects mandatory statutory or regulatory provisions. This covers wording that is included in contracts in line with the requirements of Parliament, or of those authorities which regulate them under powers granted by Parliament. Article 13 of the UTD proceeds on the basis that statutory or regulatory provisions of Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms so as to be exempt.

Describing a term as a statutory term, as the Bill does, clearly has the ability to engage Section 73 of the CRA such that those statutory terms within a private residential tenancy would not be assessable for fairness under Section 62 of the CRA, i.e. would be exempt from the 'fairness' requirement.

It is unclear to the CMA if the prescription of statutory terms is limited only to those type of terms as set out in Schedule 2 to the Bill or whether Scottish Ministers will have the power to prescribe terms in addition to those as set out in Schedule 2, as long as those set out in Schedule 2 are included. Paragraph 12 of the Explanatory Notes that accompany the Bill states "that regulations cannot be made under section 5 [of the Bill] unless they include the provisions outlined in schedule 2 [of the Bill] (emphasis added).

Whilst the CMA has no reason to believe that Scottish Ministers would contemplate prescribing terms that were unfair, the CMA is of the opinion that the situation ought to be clarified. Clarification is necessary, amongst other things, due to the ability of Scottish Ministers, under Section 5(3) of the Bill, to provide by regulation that-

(a) in some circumstances, a statutory term is not a term of a private residential tenancy.

(b) in some or all circumstances, a statutory term applies as a term of a private residential tenancy subject to any modification of the term agreed between the landlord and tenant under the tenancy.

In respect of (a), dis-applying a statutory term that is fair allows for a potentially unfair term to be inserted in its place by the landlord. The CMA is of the opinion that provision ought to be made in the Bill that, in such circumstances, any substituted term is not a statutory term and ought not to be any less favourable to the consumer than the dis-applied statutory term. Although such substituted terms would be non-statutory, they will still be required to meet the test of fairness under consumer protection law.

There are similar concerns in respect of (b) where there is the potential for a modified statutory term to claim that it is exempt from any assessment of fairness under the mandatory statutory exemption. The CMA is of the opinion that provision ought to be made in the Bill that any modification to a statutory term does not make it a statutory term. Although such modified terms would be non-statutory, they will still be required to meet the test of fairness under consumer protection law.

The CMA notes that before any regulations are made under section 5 of the Bill, “the Scottish Ministers must consult such persons representing the interests of tenants and landlords under private tenancies as they think fit”. It is not clear who it is intended should be included in this consultation, but, recognising that tenants are consumers for the purposes of consumer protection law, the opportunity to comment on s5 regulations, and the proposed model tenancy agreement, would be welcomed by the CMA.

Turning to the matter of rent caps in rent pressure zones, we are aware of the debate concerning the potential market effect of implementing these provisions. The CMA – and its predecessor bodies, the OFT and CC – has not looked in any detail at the market in private rented property in Scotland. We note that the Scottish Government’s partial Business and Regulatory Impact Assessment (BRIA) included a competition assessment of the proposals which concluded that the changes were not expected to distort competition in affected markets. However, we note that the Explanatory Notes refer to the potential for rent increase caps to reduce the supply of new rented housing or investment in improving the quality of existing housing. While there are benefits for consumers from contracting on the basis of transparent procedures for rent increases, which the Bill clearly intends to improve, it will be important for decisions on introducing rent caps to be taken with a full understanding of the potential impact on the housing market, including any adverse effect on competition. Competition provides incentives for providers to lower prices and improve their services. Markets tend to function more effectively to this end where there is no price restriction. In general terms, maximum prices (price ceilings) which are aimed at protecting consumers from high prices may act as a focal point for suppliers, with prices drawn to the ceiling, reducing the intensity of price competition between suppliers. CMA has recently published some guidance for policy-makers in

assessing competition impact and it may be of interest to the Committee that this guidance has now been included in the guidance for Scottish Government civil servants in developing their BRIAs<sup>3</sup>.

**Sheila Scobie**

**Head of Devolved Nations and CMA Representative in Scotland**

**The Competition and Markets Authority (CMA)**

**November 2015**

---

<sup>3</sup> <https://www.gov.uk/government/publications/competition-impact-assessment-guidelines-for-policy-makers>